

IP 06-0159-M 1 KPF US v Harper
Magistrate Kennard P. Foster

Signed on 6/26/06

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,)	
)	
PLAINTIFF,)	
)	
v.)	NO. IP 06-0159M-01
)	
RODNEY M. HARPER,)	
)	
Defendant.)	

ENTRY AND ORDER OF DETENTION PENDING TRIAL

This cause came before the Court for a detention hearing on June 20, 2006, held pursuant to §3141 et seq. The United States appeared by Gayle L. Helart, Assistant United States Attorney; and the defendant appeared in person and by his counsel, James McKinley.

Findings of Facts

1. The defendant, Rodney M. Harper, is charged in this cause by way of a complaint issued on June 12, 2006, with armed bank robbery, in violation of Title 18 U.S.C. §2113(a) and (d), and carrying a firearm during the commission of a felony, in violation of Title 18 U.S.C. §924(c).
2. The Court takes judicial notice of the Pre-Trial Services Report, in this cause. The government called FBI Special Agent Scott Ballock as a witness and he was cross-examined by the Defendant on the issue of probable cause. Agent Ballock was available to be cross-examined by the Defendant on the issue of detention. The Defendant did not call any witnesses on the issue of probable cause or detention.
3. The Court considered the Pretrial Services report, the charges in the Complaint, and the arguments of the parties on the issue of release or detention.

4. The evidence is strong of the commission of the charged offense.

(A) One person, armed with a firearm, robbed the Charter One Bank at 5410 Emerson Way, in Indianapolis on Saturday, June 10, 2006, at approximately 11:00 a.m. The robber obtained approximately \$2,143.

(B) A surveillance video shows the lone robber brandishing a handgun and the two employees' hands in the air.

(C) Two bank employees described the robber wearing a cap, sunglasses, a striped shirt, jeans, and putting on face covering after he entered the bank. They described him as a black male, between the ages of 25-35, approximately 5'5" and approximately 160 pounds. The employees observed that, after he pulled out a firearm from his pocket, paperwork dropped out. One teller put her foot over the paperwork so that the robber would not notice he had dropped it. The other teller, who retrieved the money from the teller drawers, placed a dye pack in the bag of money. Each teller identified the Defendant from a photographic array that they were shown later. A customer outside the bank observed the robber walk out and get into the passenger seat of a burgundy colored vehicle. The vehicle drove out of the parking lot. A bag with red colored money and loose bills was on the side of the road in an intersection approximately 2 blocks away.

(D) The paperwork dropped by the robber included a check cashing card which had been used by an individual who identified himself as Rodney Harper twice in May 2006, and a laminated birth certificate in the name Rodney Harper.

(E) Two firearms were recovered from the residence of Marvin Reeves, an acquaintance of the Defendant. Reeves told officers that the Defendant had called him during the evening of June 10, 2006, and said he was in trouble. The Defendant asked Reeves to meet him behind a grocery store near Reeves' residence. When Reeves met the Defendant, the Defendant handed him two firearms and asked Reeves to hide them. The Defendant also asked Reeves for some money and Reeves gave him \$35. Reeves recognized the firearms

because he had acquired them for the Defendant approximately 2 months earlier. Reeves also obtained clean clothing for Harper and the driver.

(F) The driver was located and interviewed. He admitted to knowing that Harper was going to rob the Charter One bank branch and driving him to the bank.

5. The evidence presented demonstrates that under the circumstances that the defendant is a danger to the community and a serious risk for flight if released.

DISCUSSION AND CONCLUSIONS

1. The defendant, Rodney M. Harper, is charged in this cause by a Complaint and Arrest Warrant with armed bank robbery, in violation of Title 18 U.S.C. §2113(a) and (d), and carrying a firearm during the commission of a felony, in violation of Title 18 U.S.C. §924(c).

2. Pursuant to Title 18 U.S.C. §2113, the charge brought against the defendant upon conviction has a penalty of up to twenty-five years imprisonment. Pursuant to Title 18, United States Code, §924(c), the charge brought against the defendant upon conviction has a non-suspendable, minimum, mandatory and consecutive term of twenty-five years imprisonment, because he has suffered a previous conviction for the offenses of armed bank robbery and using and carrying a gun during a crime of violence.

3. The Court finds that the crimes charged in the complaint constitute crimes of violence, as that term is defined in Title 18, United States Code, Sections 16 and 3156. Therefore, this Court is authorized to detain the defendant pursuant to Section 3142(f)(1)(A).

4. The Court also finds that because the defendant is charged with a potential second-offense violation of 924(c), the maximum possible penalty is life. Therefore, this Court is authorized to detain the defendant pursuant to Section 3142(f)(1)(B).

5. The Court also finds that the defendant has prior convictions for armed bank robbery and using and carrying a firearm while committing a violent prior felony, and the penalty for

the current offense is up to life because of the §924(c) charge . Therefore, this Court is authorized to detain the defendant pursuant to Section 3142(f)(1)(A), 3142(f)(1)(C) and (D).

6. Evidence of commission of the offense charged in the complaint is strong.

7. The Defendant's prior criminal history is significant because he was convicted in Cause No. IP 95-012-CR-01 H/F, Armed Bank Robbery and Use of a Firearm during Commission of a Crime of Violence, and received a sentence of 117 months. The defendant's conviction was on approximately May 18, 1995. Mr. Harper was on supervised release for that bank robbery at the time of this offense and has been since December 1, 2003.

8. The evidence presented in this case demonstrates that the defendant is an extreme danger to the community, potential witness, and is a serious risk to flee or continue robbing financial institutions, while armed, if released.

9. Because Mr. Harper has been charged with a violation of 18 U.S.C. §§ 2113(a) and (d) and a violation of Section 924(c), the rebuttable presumptions described in 18 U.S.C. § 3142(e) apply. This creates a burden of production upon the defendant, not a burden of persuasion. The purpose of the rebuttable presumptions is to shift the burden to the defendant to produce a basis for concluding that there are conditions of release sufficient to reasonably assure that the defendant will not engage in dangerous criminal activity pending trial and/or appear as required for further proceedings before the Court and/or be a serious risk to obstruct justice, or threaten, injure, or intimidate a prospective witness. The Seventh Circuit has adopted the thorough reasoning of the Court in *United States v. Jessup*, 757 F.2d 378, 381 (1st Cir. 1985). See, *United States v. Dominguez*, 783 F.2d 702, 707 (7th Cir. 1986) and *United States v. Diaz*, 777 F.2d 1236 (7th Cir. 1985). Although most rebuttable presumptions found in the law disappear when any evidence is presented by the opponent of the presumption, the rebuttable presumptions of Section 3142(e) are not such a "bursting bubble." *Jessup*, 757 F.2d at 383. Thus, in order to rebut the presumptions, the defendant must produce some evidence; and the Magistrate Judge should still keep in mind the fact that Congress has found that certain

drug offenders and individuals involved in crimes of violence, as a general rule, pose special risks of flight and dangers to the community. *Dominguez*, 783 F.2d at 707; *Diaz*, 777 F.2d at 1238; *Jessup*, 757 F.2d at 383. The Court concludes that the defendant has not rebutted the presumptions.

10. Assuming for the purposes of argument that the defendant has rebutted the presumptions, then the Court must, pursuant to 18 § 3142(e), (f) and (g), determine whether any condition or combination of conditions of release will reasonably assure the appearance of the person as required and the safety of any other person and the community in deciding whether to grant the government's Motion for Detention. The United States, with respect to the risk of flight issue or whether defendant is a risk to obstruct justice or to threaten, injure, or intimidate a prospective witness bears the burden of proof by a preponderance of the evidence. *United States v. Portes*, 786 F.2d 758, 765 (7th Cir. 1985); *United States v. Vortis*, 785 F.2d 327, 328-29 (D.C. Cir. 1986); *United States v. Fortna*, 769 F.2d 243, 250 (5th Cir. 1985); *United States v. Chimurenga*, 760 F.2d 400, 405-06 (2nd Cir. 1985); *United States v. Orta*, 760 F.2d 887, 891 (8th Cir. 1985); *United States v. Himler*, 797 F.2d 156 (3d Cir. 1986); *United States v. Leibowitz*, 652 F. Supp. 591 (N.D. Ind. 1987). With respect to risk to the community's safety, however, the United States must prove its allegations by clear and convincing evidence. 18 U.S.C. § 3142(f); *United States v. Salerno*, 481 U.S. 739 (1987); *United States v. Knight*, 636 F. Supp. 1462 (S.D. Fla. 1986); *Orta, supra*; and *Leibowitz, supra*. Detention can be based on a showing either of (1) dangerousness, or (2) risk of flight, risk of obstruction of justice, risk to threaten, injure, or intimidate a prospective witness. Proof of more than one is not required. *Fortna*, 769 F.2d at 249. Clear and convincing evidence is something more than a preponderance of the evidence but less than proof beyond a reasonable doubt. *Addington v. Texas*, 441 U.S. 418 (1979). The standard is "reasonable assurance"; the Court cannot order detention because there are no conditions which would guarantee appearance and the community's safety. *Orta, supra*; *Portes, supra*; *Fortna, supra*.

Among the factors at issue regarding Mr. Harper's release or detention are his family ties, length of residence in the community and community ties. Mr. Harper did not submit any evidence on these factors and this Magistrate Judge finds, as Congress did, that evidence of the presence of community ties and related ties have no correlation with the question of safety of the community in general and specifically regarding the risk a defendant may pose to obstruct justice or to threaten, injure, or intimidate a prospective witness. Therefore, they are of limited weight even if the defendant presents favorable evidence regarding his personal characteristics when weighed against the totality of the evidence that demonstrate a continuous pattern of armed bank robberies. *See, United States v. Delker*, 757 F.2d 1390, 1396 (3d Cir. 1985); S.Rep. No. 225, 98th Cong., 1st Sess. at 24, reprinted in 1984 U.S. Code Cong. & Ad.News at 27 (Supp. 9A).

Based on the evidence presented on the issue of detention, weighted in accordance with the standards noted above, there is clear and convincing evidence that no condition or combination of conditions will reasonably assure the appearance of the defendant as required and the safety of the community upon the defendant's release, and the defendant is therefore ORDERED DETAINED.

THEREFORE, THE COURT ORDERS that the defendant be detained pending trial on the following terms and conditions:

Defendant is hereby committed to the custody of the Attorney General or her designated representative for confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal. Defendant shall be afforded a reasonable opportunity for private consultation with defense counsel. Upon order of this Court or on request of an attorney for the government, the person in charge of the corrections facility shall deliver the defendant to the United States Marshal for the purpose of an appearance in connection with the Court proceeding.

DATED this 26th day of June, 2006.

KENNARD P. FOSTER
United States Magistrate Judge
Southern District of Indiana

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United States Marshal

United States Probation Office, Pre-trial Services Division